permanent character by reference to something so ephemeral as rules of procedure. Even if I had not taken this view, I should not be inclined to use my discretion to produce, by another means, a state of affairs which the legislature clearly intended to prohibit, viz., the diverting of the rents and profits of lands in a Malay Reservation to a non-Malay.

Application dismissed with costs to be set off against the debt.

Application Dismissed.

CHEW LEONG (f) vs. THE CHAIRMAN, SANITARY BOARD, KUALA LANGAT.

[App. Crim. Juris. (Cussen, J.) August 8, 1941]

Sanitary Boards Enactment (Cap. 137) — Demolition order — Section 83 — Closing order, section 80 — Sub-sections (vi) and (vii).

Building belonging to the appellant had been closed by an order made under section 80, sub-sections (vi) and (vii) of the Sanitary Boards Enactment on the ground that they were unfit for human habitation.

The Magistrate on a subsequent date made a demolition order in respect of the same building the evidence being to the effect that the houses were in the same condition as when the closing order was made.

Held, that before the demolition order could be made there must be evidence in the demolition proceedings of the existence of the three conditions set out in section 83 of the Enactment and that the Magistrate was not entitled to act on the evidence led in the previous proceedings.

Appeal from the decision of the Magistrate at Telok Datoh.

The facts appear from the judgment.

M. Edgar for appellant :—

Section 80 (6) provides that a closing order may prohibit a dwelling-house from being used for human habitation. The Act does not prohibit use for other purposes. If the intention of the legislature had been that it could not be used for any other purposes, it would have been easy to say so. The paramount consideration is the question of human habitation, **Halsbury**, Volume 26, page 555, paragraph 1168. The property in question is not being used for human habitation but solely for storing purposes, section 83 of the Sanitary Boards Enactment does not apply.

W. M. McCall, Deputy Public Prosecutor, for respondent.

Cussen, J. : — This is an appeal against a demolition order under section 83 of the Sanitary Boards Enactment (Cap. 137) made by the Magistrate at Kuala Langat in respect of certain buildings on the appellant's land.

A closing order under section 80 (vi) and (vii) had been previously made and obeyed by the appellant.

Section 80 (vi) and (vii) reads :—

"(vi) A closing order may prohibit a dwelling-house from being used for human habitation;

(vii) A closing order shall only be made when it is proved to the satisfaction of the Magistrate that by reason of a nuisance a dwelling-house is unfit for human habitation....."

The buildings remaining on the land (some had been demolished by the appellant after the closing order was made) were no longer being used as dwelling-houses.

Section 83 of the Enactment empowers a Magistrate, where a closing order has been made in respect of any dwelling-house, to make a demolition order if :—

(a) The dwelling-house has not been rendered fit for human habitation;

(b) The necessary steps are not being taken with all due diligence to render it so fit; and

(c) The continuance of any building being or being a part of the dwelling-house is dangerous or injurious to the health of the public or of the inhabitants of the neighbouring dwelling-houses.

All these three conditions must be fulfilled before a demolition order can be made.

In his grounds of judgment the Magistrate states as follows :—

> "From the evidence of the first witness I gathered that these buildings were in the same condition as when the closing order was made, i.e., these buildings were not fit for human dwelling and no step had been taken to render these buildings fit for human dwelling. It was already proved at the time when the closing order was last made that the existence of these buildings was injurious and dangerous to the health of the public. There was no appeal against this order".

The existence of the three conditions set out above (a), (b) and (c) must be proved by admissible evidence given before him before a Magistrate can exercise the power to make a demolition order.

It is not competent for him to base his finding (as he does in this case in respect of condition (c)) on the evidence given and findings made in another proceeding whether before another Magistrate (as in this case) or before himself.

There was no evidence before the Magistrate to support the conclusion that the existence of these buildings was injurious and dangerous to the health of the public.

It is also relevant to point out that the basis of a closing order is that "by reason of a nuisance a dwelling-house is unfit for human habitation" whereas for a demolition order the third condition precedent is that "the continuance of any building . . . is dangerous or injurious . . . ."

For these reasons this appeal was allowed.

Appeal Allowed.

HAJI SULAIMAN BIN HAJI ABDUL WAHID vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (McElwaine, C.J. (S.S.), Aitken, Ag. J.A. and Cussen, J.) August 23, 1941]

Criminal trial — Defence of alibi — Direction to Assessors — Criminal Procedure Code, Section 113.

In this country an observation by a trial Judge in his summing up to the Assessors to the effect that the failure of the accused to disclose an alibi defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence can hardly ever be made in fairness to the accused in view of section 113 of the Criminal Procedure Code (Cap. 6).

Appeal from a conviction for the murder of Mary Zeinah Maxwell, section 302 of the Penal Code (Cap. 45), which resulted from a trial held on April 28th, 29th, 30th and May 1st, 2nd, 3rd at Ipoh before Mr. Justice W. K. Horne.

The appellant appealed to the Court of Appeal on various grounds. The case is reported on one point only.

Mr. J. L. Woods for appellant :—

The trial Judge misdirected the Assessors in connection with the non-disclosure of the defence at an earlier stage.

He stated "There is a peculiar thing about the accused's story: that he has not been able to call anybody else who saw him carry out this journey, either way, on the 5th November..... Clearly he must have known that though a person is on remand he is not prevented from sending for witnesses..... There is therefore that to be said about the accused's evidence, about his alibi evidence of the 6th, that he has not, so far as we know, so far as there is any evidence before us, ever disclosed it to anybody until some time shortly before his trial ....." and again later "Now as regards the 6th his evidence is an alibi.....and, as I say, it is a fact that it has never been produced until this trial".

These expressions used amounted to a serious misdirection. R. v. Naylor[1] lays down that adverse comments on a prisoner's failure to make a statement on a preliminary inquiry are improper and although the case has been distinguished and explained it has never been overruled. Parker's case[2] was decided on the basis that in justice to two prisoners who had disclosed their defences early a reference to that should be made in their favour, but this case does not support any proposition that adverse comment may be made on non-disclosure alone. Littleboy's case[3] explains that comment on non-production of a defence at the earliest opportunity is permissible but that observations must be made with great care and fairness to the accused and the distinction is pointed out between such comments when made fairly as a mere observation touching the credibility of the defence and such observations when suggesting a directly adverse inference unfavourable to the accused. The effect of these three cases is considered in Chhui Yi's case[5] and the English Law is there approved as being law in this country. Smith's case[4] which is a later English decision that was not cited in Chhui Yi's case seems to confine considerably further the scope within which a trial Judge should comment and is somewhat similar to the present case. Mr. Justice Singleton delivering the Judgment of the Court at p. 124 states: "having commented inaccurately on that part of the case the Acting Deputy Chairman, proceeded to tell the jury that both prisoners had said nothing when they were before the Magistrate. They were entitled to say nothing. Each had given his answer to the police and each was represented at the Police Court. The fact that they said nothing at that stage ought not to have been used against them in the summing up. We think that there was misdirection in that respect also". This passage in the judgment, together with the observations of the Court as reported at page 122, shows clearly that the Court held the view that comment should not be made unless in exceptional circumstances such as existed in Parker's case. In the present case the observations of the learned trial Judge definitely suggest that the Assessors should take into account against the accused the fact that he made no statement at the preliminary inquiry. Furthermore, and this is of vital importance, the learned trial Judge has given a completely inaccurate direction in his comments. He has suggested that there is no evidence before the Court that the alibi was disclosed to anybody until shortly before the trial at the Assizes, and later he has stated to the Assessors as a fact that the alibi was never produced until the trial at the Assizes. The learned Judge had in his hands a copy of the Record at the preliminary inquiry at which the accused gave the name of a witness Yeop, whom he wished to call at his trial. That witness was a witness to his alibi and to nothing else, and, in the circumstances of the accused having put forward this witness at the preliminary inquiry, it was an entirely incorrect and unfair comment to suggest that the alibi had never been produced until the trial. Furthermore, the learned Judge must have known that statements are taken from accused persons by the police, and, in view of the fact that the learned trial Judge had no means of knowing whether or not the accused had set up his alibi to the police, the learned trial Judge should have confined his comments, if any were justified at all, to a most careful reference to Court proceedings only.

Mr. T. T. Russell, Assistant Legal Adviser, for respondent.

Cases referred to :—

(1) *Rex v. Naylor* 23 C.A.R. 177.

(2) *Parker's Case* 24 C.A.R. 2.

(3) *Rex v. Littleboy* 24 C.A.R. 192.

(4) *Smith's Case* 25 C.A.R. 119.

(5) *Rex v. Chhui Yi* (1936) M.L.J. 177.

The judgment of the Court of Appeal was delivered by:

Aitken, Ag. J. A. : — The attack upon the learned Judge's summing up in respect of alleged misdirections disclosed a more serious situation, which may well have prejudiced the case for the defence in the minds of the Assessors. Most of the alleged misdirections concern the alibi set up by the accused,